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Using Technology to hold meetings and sign and send documents August 2021-Allens Submission

Thank you for giving us the opportunity to comment on the exposure draft legislation: *The Treasury Laws Amendment (Measures for Consultation) Bill 2021; Use of Technology for meetings and related amendments*.

We strongly support the Bill as a very welcome step in moving corporate documents and meetings into the digital age, cementing and improving on the reforms in TLAB1 (the *Treasury Laws Amendment (2021 Measures No. 1) Act 2021*).

We do have the following comments:

Items 1-16 relating to the execution of documents

This is an important opportunity to achieve certainty in the market as to the ability of companies to sign documents electronically. There has been some inertia, and market participants have proved reluctant to adopt electronic signing when some advisers perceive uncertainty or risk. The reforms need to be clear so that there is wide acceptance in the market that they work. Otherwise they will not have the desired effect

It is therefore important that the legislation address all possible concerns and reservations.

1. *Expressly removing the paper rule for deeds signed under ss126 and 127*

   Some law firms have expressed the view in publications that the reforms to s127 in TLAB1 might not remove the common law rule that deeds must be on paper parchment or vellum. They say therefore that in states that have not abolished that requirement, deeds may not be able to be electronic, even if signed under TLAB1. That logic may apply to s110, 110A, 126 and 127 as amended under the Bill.

   While we do not share that view, the issue should be removed beyond doubt. There should be a provision making very clear that the paper rule does not apply to deeds executed under s126 or 127. That is, it should provide expressly that a deed signed under those sections can be effective as a deed despite not being on paper,

2. *Authority to deliver deeds under s126*

   The amendments to section 126 are extremely welcome in authorising agents to execute deeds on behalf of a company, even if not appointed by deed. They should also authorise such agents to deliver deeds, to cover the possibility that 'execute' is given its strict legal meaning and does not include delivery.[1] To be effective deeds not only need to be executed but also delivered. The common law provides that an agent can only deliver a deed if appointed by deed.

   As the term 'execute' is also used in s127 it would be useful to address the issue in relation to that that section as well.

3. *Deeds signed under section 126 should not need witnessing*

   Section 126 should clarify that the agent's signature to a deed does not need to be witnessed. Otherwise there would be a concern that a witness would still be required under state laws (except Victoria, and at least temporarily, Queensland). Witnessing is not required in relation to execution by companies under section 127(1), even by sole directors. It would be inconsistent to need it for s126.

   In our experience, witnessing is of very little, if any, use. The benefit is largely illusory. A witness can be a random stranger brought in off the street, and needs only to see the signer sign, and attest that fact with a signature. A witness does not need to know the signer or satisfy himself or herself as to the signor's identity, does not need to know the contents or purpose of the document being signed, and does not need to check whether execution is voluntary, or to write the witness's name legibly (or at all) or to give any contact details. And with some modes of electronic signing, witnessing creates practical difficulties.

4. *S126 should cover the appointment of corporations as agents*

   The advantages of section 126 (particularly, those outlined in 2 above in relation to deeds) should extend to corporations being appointed as agents by companies, not just individuals being appointed as agents.

   Companies sometimes appoint other companies as agent rather than an individual. This is quite common in finance documentation involving corporate groups where members of the group appoint one of their number to deal with the financier. It is also common in syndicated financings where lenders authorise the facility agent (usually a bank or specialist agency company) or security agent or trustee to sign documents on their behalf. It is also common in a variety of contracts and contexts in further assurance clauses and step-in rights.

5. *Sections 110A(1) and (2) should not limit methods of physical signing for the purposes of ss126 and 127.*

   There is a concern abroad about section 110(A)(2) applying to both physical and electronic signatures. The application of the same test to both physical and electronic signatures might limit the variety of acceptable physical signatures. One of the concerns relates to whether it removes the counterparty's current ability in relation to physical signing under s129(5) and (6) to rely on an indecipherable signature above the word 'director' (not an uncommon situation).

   It has been suggested that s110(4) allows the signatory to sign physically even without complying with s110A, so a scrawled wet-ink signature could still count irrespective of the s110A(2) tests. The difficulty with that suggestion is that it may not be clear that section 110(4) applies to signatures under section 126 and 127. There is an argument that it merely preserves avenues for signature when applicable outside the Division, and that section 110A sets out the complete rules for signatures under ss126 and 127.

   This should be clarified by including something like "under sections 126 or 127 or otherwise" at the end of subsection 110(4).

[1] N Seddon *Seddon on Deeds* p39

6. *Examples of esigning in EM*

   It would be helpful if the EM in relation to section 110A gave some examples of esigning, similar to the EMs for TLAB1 and the Treasurer's Determination, including pasting signatures, using a stylus, and using DocuSign or similar platforms.

7. *The removal of section 129(3A)(b) and amendment of paragraph (c)*

   We understand it has been suggested that section 129(3A)(b) be removed. We agree.

   If one interpretation mentioned is correct there would indeed be a gross overreach, as that would mean the humblest procurement clerk could sign away the company. Our own reading of paragraph (b) is much narrower — that it only says that the outsider can assume that the agent can sign something within the agent's express or implied authority. But on that reading the paragraph doesn't take one very far.

8. *Assumptions in ss129(5) and (6) on statements as to directors and secretaries*

   The second parts of sections 129(5) and (6), allowing counterparties to make assumptions concerning sole directors, should extend to other directors and secretaries. That is, there should in those subsections be additional paragraphs (c) and (d), or (e) and (f) covering secretaries and directors

9. *Assumption as to signing under s126*

   A new assumption should be added in s129 to allow parties dealing with agents to assume their signatures comply with s110A. This is to bring it closer to the position applying in relation to signatures under s127(1) (which have the benefit of the assumption in s129(5).

10. *Remove the requirement in section 110B(c) that the signer of a document submit it for lodgement*

    Section 110B(c) seems to require that it be the signer of a document that submits it for lodgement. In order for ASIC to be required to accept it. What happens if it is lodged by another party, or there are two signers? We do not see why this should be a requirement and suggest it be removed. The section should operate whenever an electronically signed document is lodged, regardless of who lodges it.

To maximise the economic benefit within the Commonwealth's constitutional remit similar reforms should be extended to foreign and statutory corporations, which are an important part of the economy. It is a an important reform, which should be considered as soon as possible.

Remainder of Bill

How the Corporations Act might apply to charities that are public companies limited by guarantee.

Section 111L 'switches off' certain provisions of the Corporations Act for charities registered with the ACNC. All of the new provisions regarding meetings of members contained in TLAB1 and the exposure draft Bill should be 'switched off'.

Snap transition to new meetings rules under proposed s1687B can cause difficulties

The transitional provisions give rise to a practical issue which we know has the potential to cause concern and detriment to a number of public companies who are planning their AGM.

That arises because such companies need to start planning for their AGMs months ahead of the meeting date, and before notices of meeting are issued. The process includes advance consideration and planning by management and the board, obtaining requisite advice, preparation of the notices, proxy forms, and materials, clearance by the ASX, and then printing and despatch of the notices and materials.

In particular, companies with a 30 September balance date will need to hold their meeting before the end of the calendar year. This means that the notice of the meeting will need to be dispatched in early November. We are aware of a number of companies proposing to hold their meetings virtually in reliance on the current law. However, they do not have an authorisation for virtual meetings in their constitution and, therefore, would plan to put the adoption of one to its members at its next AGM.

In essence, under s1687B if a company dispatches a notice of meeting before the commencement date of the new Act, then it can hold a virtual meeting under the current provisions under TLAB1. If notice is sent on or after the commencement date occurs, then it may not (because of the introduction of section 249R(c)).

The difficulty is that it will not know when the commencement date will be. Furthermore, it is unlikely to have any assurance until that date is almost upon it. So it does not know what kind of meeting for which to prepare, and may not have any degree of certainty until the last minute. The practical implications are significant, for example, booking a venue, ensuring it can have socially distant seating, organising security, ensuring that its registry staff are vaccinated and able to attend, and determining how to administer entry for both vaccinated and unvaccinated shareholders in the absence of any clear regulatory position and uncertainty about the public health requirements that may prevail at that time. These practical considerations, eg booking and holding space, tend to come at a significant cost for very large listed companies, which is then borne by shareholders. There is also additional management time that must be dedicated to pursuing the two different alternatives.

We suggest that the transitional provisions provide some leeway so listed companies and schemes can plan with some certainty. That is, companies and schemes should be able to elect to hold meetings under the existing rules if the meetings are held before 1 April 2022. To this end, sub-paragraph (a) in section 1687B ought to be deleted. We think the position we advocate here is consistent with the Treasurer's announcement of the changes which were focused on providing certainty:

> "These temporary relief measures will allow companies to hold virtual meetings and use electronic communications to send meeting materials and execute documents until 31 March 2022. This relief ensures that companies can meet their obligations as they continue to deal with the uncertainty of the COVID-19 pandemic. In particular, the renewed relief will give much needed certainty to listed and unlisted companies that are expected to hold an annual general meeting later this year and early next year."

We would be very pleased to discuss the above further.

Yours sincerely

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Attach